

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY BASCOMB,

Plaintiff-Appellee,

v

MICHIGAN LAW ENFORCEMENT OFFICERS
TRAINING COUNCIL,

Defendant-Appellant,

and

COUNTY OF WAYNE and WAYNE COUNTY
SHERIFF,

Defendants.

UNPUBLISHED

October 4, 2002

No. 226660

Wayne Circuit Court

LC No. 93-300668-CL

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendant Michigan Law Enforcement Officers Training Council (herein “defendant”) appeals as of right the entry of judgment in favor of plaintiff, following a jury verdict awarding plaintiff \$400,000 in economic damages and \$150,000 in noneconomic damages on his claim of retaliatory dismissal pursuant to the Persons With Disabilities Civil Rights Act (PWDCRA).¹ The judgment also awarded plaintiff attorney fees of \$128,850 and costs of \$4,951.16. We affirm.

I

This case is before this Court for the second time. Plaintiff, an uncertified (“nonsworn”) police officer employed by the Wayne County Sheriff Department, claimed that defendant, the government agency charged with oversight of police officer certification in Michigan, illegally retaliated against him for filing a handicap discrimination lawsuit against defendants after he was

¹ MCL 37.1101 *et seq.* (formerly known as the Michigan Handicappers’ Civil Rights Act).

initially denied admittance to the certification program on the basis of his diabetes. Plaintiff claimed economic damages for lost wages based on the promotions and salary increases he would have received as a sworn police officer upon completion of the certification program.

In a prior decision involving plaintiff's claim of handicap discrimination, a divided panel reversed the trial court's grant of summary disposition in favor of defendants, finding a material factual dispute regarding whether plaintiff's diabetes affected his ability to perform the duties of a certified police officer. The majority reasoned that if a handicapped job applicant can attain the required job performance levels in a reasonable time, he must be allowed the same opportunity as other applicants to secure the position. The opinion concluded that conflicting testimony regarding whether plaintiff's diabetes could be sufficiently controlled warranted a trial on the merits.

Following this Court's reversal and remand, plaintiff was granted leave to amend his complaint to add a retaliation claim based on ironic circumstances involving his admission to the academy certification program in August 1996, after the Wayne County Sheriff Department ordered him to attend, and his subsequent expulsion from the program by defendant, allegedly in retaliation for having filed his discrimination lawsuit in 1993. Plaintiff later voluntarily dismissed Count I of his complaint, the discrimination claim.

Defendant moved for summary disposition of plaintiff's retaliation claim, arguing that the claim was not viable because, as a threshold matter, plaintiff was not medically fit to be certified or to attend the academy. The trial court denied defendant's motion, concluding that the dismissal of the discrimination claim did not compel a conclusion that plaintiff's original lawsuit, filed in January 1993, was not a substantial factor in plaintiff's expulsion in 1997 or that plaintiff would have been expelled in 1997 even had he not filed the lawsuit. The retaliation claim proceeded to trial, and the jury returned a verdict in favor of plaintiff.

II

Defendant first argues that the trial court erred in denying defendant's motions for summary disposition or for directed verdict because litigation of plaintiff's retaliation claim was precluded by the doctrine of collateral estoppel. Defendant argues that, as a matter of law, plaintiff's voluntary dismissal of his handicap discrimination claim conclusively established that he was not medically eligible for the academy, which was a legitimate ground for defendant's dismissal of plaintiff and absolves defendant of any liability for retaliation. Thus, defendant argues that its mixed motive defense to the retaliatory dismissal claim was proven, i.e., defendant was not liable for retaliation because it would have made the same decision without consideration of the discriminatory factors. We disagree.

This Court reviews de novo both a trial court's decision on a motion for summary disposition and issues concerning the application of the doctrine of collateral estoppel. *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior action culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Id.* Collateral estoppel does not apply unless the issues are identical. *Horn v Dept of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996). The ultimate issue in the second action must be the same as that in the first. *Detroit v Qualls*, 434

Mich 340, 357; 454 NW2d 374 (1990); *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

Defendant confuses the doctrines of res judicata and collateral estoppel to incorrectly conclude that a voluntary dismissal has preclusive effect as an adjudication on the merits with regard to the issue of plaintiff's medical eligibility. A voluntary dismissal with prejudice constitutes a decision on the merits for the purpose of application of *res judicata*, i.e., claim preclusion. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). However, collateral estoppel, i.e., issue preclusion, is a narrower doctrine and applies only if the issues in the first case were actually and necessarily litigated with a finding on which the judgment depended. Lang, Nielson, Young & Holsinger, Michigan Civil Procedure, § 20.97, p 20-46; *Horn*, *supra* at 62.

The issue of plaintiff's medical fitness was not actually litigated, and therefore collateral estoppel does not apply to preclude plaintiff from challenging defendant's mixed motive defense. Further, the requirement that the issues be identical also is not met. The ultimate issue in the previous claim was handicap discrimination and the issue in the later claim was retaliation.

Defendant's contention that its mixed motive defense was established as a matter of law and precludes liability for retaliation, is similarly flawed. In *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997), this Court held that in a direct evidence, mixed-motive employment discrimination claim, in addition to challenging a plaintiff's claim that discriminatory animus resulted in an adverse employment action, an "employer may also assume the burden of persuading the factfinder that, even if the plaintiff's allegations are true, the employer would have made the same decision without consideration of discriminatory factors." That is, a defendant may assume the burden of persuading the factfinder that the discriminatory motive was not a determining factor in its employment action. *Id.*

Under *Harrison*, even assuming that plaintiff was collaterally estopped from arguing that he was medically fit, defendant would not be entitled to judgment as a matter of law merely because it asserted a mixed motive defense. As the trial court concluded, there was a genuine factual dispute whether defendant would have otherwise dismissed plaintiff from the academy, on the basis of his medical fitness, after he had nearly completed the certification process, and thus summary disposition nevertheless would have been improper.

III

Defendant next argues that it was entitled to judgment as a matter of law because the undisputed evidence and the law of the case established that plaintiff is unable to meet the medical requirements for certification. As discussed above, even if plaintiff's lack of medical fitness were established on these bases, this fact is not dispositive of plaintiff's retaliation claim. Defendant was not therefore entitled to judgment as a matter of law.

This issue is unpreserved because it was not raised before the trial court. Nonetheless, review may be granted if consideration of the issue is necessary to a proper determination of the case or if the question is one of law concerning which the necessary facts have been presented. *Steward v Panek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 222847, issued 6/4/02) slip op p 5.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). Defendant's argument that this Court's prior decision, *Bascomb v Wayne County*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 1996 (Docket No. 170977), requires a finding that plaintiff is ineligible for certification is unconvincing.

This Court previously found that there was a genuine factual dispute whether plaintiff's diabetes affected his ability to perform the duties of a certified police officer. Although there was significant evidence that plaintiff's diabetes was uncontrolled, there was also evidence that that condition was easily correctable with minor adjustments to his treatment plan. *Id.* at 2-3. Regardless of any subsequent change in the law concerning the reasonable time to heal doctrine, this Court's prior decision contains no dispositive ruling on plaintiff's medical eligibility for the future, i.e., in 1996, particularly in light of this Court's statement that "[a]lthough diabetes is arguably a permanent condition ... plaintiff's disability is permanent only in the sense that he will always have diabetes." *Id.* at 3. The issue whether plaintiff's diabetes related to his ability to perform his job was an unresolved factual question.

Further, the law of the case does not control if there has been a material change in facts. *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981); *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 654-655; 625 NW2d 40 (2000). Here, there was a four-year time span between the handicap discrimination claim and the subsequent alleged retaliatory dismissal. This Court's ruling concerning the 1992 discrimination claim does not establish the law of the case with respect to the 1996 retaliation claim because plaintiff's diabetic condition materially changed during the interim four years, and plaintiff was subsequently admitted to the academy on the basis of new medical evaluations and a determination that he was medically eligible.

In any event, the trial court fully considered defendant's arguments in this regard and correctly concluded that even if plaintiff's medical ineligibility was conclusively established, his retaliation claim was nevertheless viable. As discussed above, defendant could attempt to persuade the factfinder that its retaliatory motive was not a determining factor in its decision to dismiss plaintiff from the academy certification program. *Harrison, supra* at 613. However, defendant was not entitled to judgment as a matter of law because evidence that defendant could reject plaintiff for certification was not conclusive of whether it would or did reject plaintiff for that reason. The trial court properly concluded that there was a genuine factual dispute whether plaintiff's initiation of the lawsuit was a substantial enough factor in his dismissal from the academy that he could recover on his retaliation claim.

That defendant's mixed motive defense did not automatically entitle it to judgment as a matter of law is supported by case law addressing the effect of after-acquired evidence of employee misconduct on a civil rights action. *Horn, supra* at 67. In *Horn*, this Court held that after-acquired evidence of wrongdoing that would have resulted in termination did not bar all relief as a matter of law for an earlier civil rights violation. *Id.* at 67-69.

Barring all relief for discrimination on the basis of after-acquired evidence of grounds for termination would be inconsistent with the objective of deterring workplace discrimination. *Id.* at 66-67. Any wrongdoing can be reflected in the nature of the relief granted, thereby precluding “the exoneration of either wrongdoer while preserving the statutory goal of deterring discrimination.” *Id.* at 67, quoting *Wright v Restaurant Concept Management, Inc.*, 210 Mich App 105, 113; 532 NW2d 889 (1995).

This case differs from *Horn* in that the trial court here found a genuine factual dispute regarding whether defendant would have dismissed plaintiff from the academy absent its retaliatory motivation. However, the analysis in *Horn* leaves no doubt that the trial court properly rejected defendant’s argument that it was absolved from any liability for retaliation merely because plaintiff might have been legitimately dismissed from the academy on the basis of his uncontrolled diabetes.

IV

Defendant next alleges three errors in regard to the trial court’s admission of evidence. We find no error.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Bachman v Swan Harbour Ass’n*, ___ Mich App ___, ___ NW2d ___ (Docket No. 248841, issued August 9, 2002), slip op p 19. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id.*

First, the trial court did not abuse its discretion in admitting evidence of plaintiff’s medical fitness. Defendant argues that because plaintiff was collaterally estopped from arguing that defendant wrongly expelled him from the academy because of his diabetes, the evidence of plaintiff’s medical eligibility was not relevant and should not have been admitted.

Although decided in the context of a discrimination claim, not retaliation, *Harrison, supra* at 613, held that in a mixed motive defense case, the employer has the burden of persuading the factfinder that the plaintiff’s protected status, or in this case retaliation, was not a determining factor in the employer’s decision. Ordinarily, where there is direct evidence of discrimination, an employer may not avoid trial by merely articulating a nondiscriminatory reason for its action. *Id.* Likewise, defendant could not avoid trial by establishing a nonretaliatory basis for its dismissal.

There was a genuine factual dispute whether retaliation was a determining factor in defendant’s action of aborting plaintiff’s certification process after he had completed the training. The evidence of plaintiff’s medical condition in 1996, leading to his admission to the academy, was relevant to this issue because it tended to make the existence of a fact that was of consequence to the determination of the action more probable or less probable. MRE 401. The medical determinations tended to show that plaintiff was legitimately admitted to the academy in August 1996 and that the determining factor in defendant’s dismissal in 1997 was retaliation for plaintiff’s filing of the discrimination lawsuit, not his medical condition. Because the evidence

was relevant, and plaintiff has not otherwise established a basis for its exclusion, the evidence was admissible. MRE 402.

Second, the court considered and correctly rejected defendant's argument that its staff person's reference to plaintiff's lawsuit in dismissing plaintiff was inadmissible as evidence of a subsequent remedial measure, MRE 407. The remarks at issue did not fall into the category of subsequent remedial measures. As the court noted, there was no tangible effort by defendant "that would prevent this from occurring to other individuals." Further, testimony concerning the nature of the remarks would assist the factfinder in assessing any "discriminatory intent."

Third, the trial court did not abuse its discretion in failing to exclude plaintiff's testimony concerning his economic damages because his claim for lost wages and benefits incidental to certification was speculative. Defendant's argument is again premised on plaintiff's medical ineligibility for certification. Defendant contends that plaintiff was not entitled to losses for a job for which he was unqualified and ineligible.

On the basis of the foregoing analyses concerning collateral estoppel, the record evidence, and the law of the case, the trial court correctly determined that there was a genuine issue of material fact whether plaintiff would have been dismissed from the certification training absent defendant's retaliatory motivation. Contrary to defendant's argument, at-will employees alleging intentional discrimination are not limited to nominal front-pay damages. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 607-608, 613; 600 NW2d 66 (1999). Because the court did not abuse its discretion in admitting evidence of economic damages, the court did not err in failing to instruct the jury that plaintiff was not entitled to economic damages.

V

Defendant next argues that the award of \$400,000 in economic damages was excessive and legally inconsistent with the jury verdict and plaintiff's duty to mitigate because plaintiff could have mitigated his damages by demonstrating his medical fitness and obtaining certification.

We decline to review the issue that the damages were excessive. Defendant has failed to present the damage award challenge in its statement of questions. A point that is not set forth in a party's statement of questions is not properly presented for appeal. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Further, defendant failed to preserve this issue for appeal by moving for a new trial or for remittitur. *B & M Die Co v Ford Motor Co*, 167 Mich App 176, 184; 421 NW2d 620 (1988).

A trial court's decision regarding remittitur is reviewed on appeal for an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989). "[T]he question of the excessiveness of a jury verdict is generally one for the trial court in the first instance." *Id.* The trial court, having witnessed the testimony and the evidence as well as the jury's reactions, is in the best position to evaluate the credibility of the witnesses and make an informed decision concerning excessiveness, and thus due deference should be given to the trial court's decision. *Id.* at 531, 534; *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). Because defendant's challenge to the jury award was not raised before the trial court, it is not properly reviewed by this Court in the first instance.

In any event, our review of the record indicates that defendant's challenge is without merit. The jury award for economic damages falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, and it should not be disturbed. *Craig v Oakwood Hosp*, 249 Mich App 534, 567; 643 NW2d 580 (2002) (Cooper, J, concurring). Witnesses testified that plaintiff would have been promoted to sergeant had he been allowed to complete the certification process, which amounted to a \$12,000 annual wage difference. Plaintiff calculated that he was thirty-one years of age when he was dismissed from the academy, and had he worked until the retirement age of sixty-five, the wage difference was \$408,000.

The damages were not speculative or excessive. *Goins v Ford Motor Co*, 131 Mich App 185, 199; 347 NW2d 184 (1983). Whether plaintiff should be awarded front pay was a factual question for the jury in the context of this case, *Horn, supra* at 67. There was evidence that other certified officers were diabetics and three doctors provided medical clearances for plaintiff to attend training: his treating physician, a physician retained by the Wayne County Sheriff Department, and an ophthalmologist. Defendant's argument that plaintiff was required to mitigate his damages by proving his medical fitness and becoming certified after his dismissal is without merit. Nor does plaintiff's failure to prove medical fitness in this regard render the verdict internally inconsistent. As plaintiff points out, defendant's expulsion of plaintiff from the academy in effect precluded his certification for any sworn officer position in the state of Michigan.

VI

Finally, defendant argues that the court erred by awarding plaintiff's request for attorney fees and costs. This Court reviews the award of attorney fees and costs under the PWDCRA for an abuse of discretion. *Yuhase v Macomb County*, 176 Mich App 9, 13; 439 NW2d 267 (1989). The award of \$133,801.16 in fees and \$4,951.16 in costs was not an abuse of discretion.

Damages in actions under the PWDCRA include reasonable attorney fees. MCL 37.1606(3); *Yuhase, supra* at 15. The same criteria that govern attorney fee awards under Michigan's Civil Rights Act, MCL 37.2101 *et seq.*, apply to these awards. *Yuhase, supra* at 14. There is no precise formula for assessing the reasonableness of an attorney fee, but factors that should be considered include: (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitations imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. *Grow v WA Thomas Co*, 236 Mich App 696, 714-715; 601 NW2d 426 (1999). Fees for multiple lawyers are permissible. *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429-430; 552 NW2d 466 (1996).

The court granted plaintiff's motion for fees and costs in light of the above factors. Viewing the court's rationale for the award and the supporting documentation, and defendant's lack of evidence that the fees and costs requested were unreasonable, we find no abuse of discretion. Defendant did not request an evidentiary hearing, even though suggested by plaintiff, and provided no evidence to rebut the reasonableness of the requested hourly rate. Further, the

trial court did not err in awarding requested costs under the PWDCRA. *McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 402; 493 NW2d 441 (1992); *Yuhase, supra* at 10, 14-15.

Affirmed.

/s/ Janet T. Neff

/s/ Kathleen Jansen